

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

**IN RE ENBRIDGE ENERGY, LIMITED
PARTNERSHIP**

Application pursuant to 1929 PA 16;
MCL 483.1 *et seq.* and Rule 601 of the
Michigan Public Service Commission's
Rules of Practice and Procedure,
R 460.17601 to Replace, Construct and
Operate a Segment of Pipeline for the
Transportation of Crude Oil and
Petroleum from its Stockbridge Pump
Station to its Ortonville Station

Case No. U-16838

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on March 13, 2012.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before March 27, 2012, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before April 10, 2012. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective

unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING
SYSTEM
For the Michigan Public Service Commission

Theresa A. Sheets
Administrative Law Judge

March 13, 2012
Lansing, Michigan

* * * * *

Case No. U-16838

Enbridge Energy, Limited Partnership (Enbridge) and its affiliate, Enbridge Pipelines, Inc., own and operate the world's longest crude oil and liquid petroleum pipeline system spanning approximately 3,500 miles from Alberta, Canada through the U.S. Midwest to eastern Canada. 4 Tr 111. Enbridge owns and operates the U.S. portion of the system (known as the Lakehead System) and Enbridge's counterpart, Enbridge Pipeline, Inc., operates the Canadian portion of the pipeline system. *Id.* The Lakehead System consists of

approximately 1,900 miles of various sized pipelines traversing from the international border near Niche, North Dakota, to the international border near Marysville, Michigan, with extension facilities in Canada across the Niagara River into the Buffalo, New York area. *Id.* The Lakehead System operates in seven Great Lakes states and transports between 50% and 75% of the crude oil needed by refineries in the upper Midwest. *Id.* at 111-112.

Enbridge is a transporter of energy only and does not own, produce or refine the crude oil transported on the Lakehead System. *Id.* Enbridge is the owner and operator of the Line 6B which is the subject of this PFD. 4 Tr 112.

On July 26, 2010, a pipeline leak was discovered on Enbridge's Line 6B pipeline. The failure occurred at Mile Post 608, approximately one mile south of the town of Marshall, Michigan. Exhibit S-1 p 1.¹ As a result of the ruptured pipeline, an estimated 19,500 barrels of crude oil was released. *Id.* Spilled oil from Enbridge's pipeline entered the Talmadge Creek and the Kalamazoo River. *Id.* The Spill has migrated as far downriver as Augusta, Michigan. Exhibit S-1, p 7. In response to this pipeline leak, the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) initiated an investigation of the Marshall failure and issued a Corrective Action Order on July 28, 2010, directing Enbridge to take certain action regarding the ruptured pipeline. See Exhibit S-1 pp 1 and 7-11; See also Exhibit S-2. Subsequently, on September 22, 2010, PHMSA issued an Amendment to that Corrective Action

¹ This ALJ notes that Exhibit S-1 has some pages that are out of order. The Corrective Action Order of the PHMSA begins on page 1 of 11 and then continues on pages 7 of 11 through 11 of 11 of that exhibit. The Notice of Proposed Amendment to the Corrective Action Order of the PHMSA is set forth on pages 2 of 11 through 6 of 11 of Exhibit S-1.

Order directing additional requirements relative to Line 6B's integrity analysis and remediation. See Exhibit S-1 pp 2-6; See also Exhibit S-2.

In the Notice of Proposed Amendment to the Corrective Action Order, PHMSA, stated,

The [Corrective Action Order] also imposes an ongoing 20 percent pressure reduction, requires inspections and evaluations of *additional sections of the pipeline to determine if conditions similar to those associated with the Marshall Failure were likely to exist elsewhere on Line 6B*, and requires the development, implementation, and completion of an integrity verification and remedial work plan before a return to full pressure operations will be permitted. (Emphasis added).

Exhibit S-1 p 2.

Pursuant to the directives of PHMSA, on September 26, 2010, Enbridge submitted a "Line 6B Integrity Verification and Remedial Work Plan" (Plan) to PHMSA. Exhibit S-2. According to correspondence dated November 1, 2010, from PHMSA to Enbridge Energy Partners, L.P.,² PHMSA was not satisfied with Enbridge's approach to the long-term integrity plan for Line 6B and stated,

While PHMSA appreciates Enbridge's efforts thus far to promptly complete needed repairs under the [Corrective Action] Order [as amended], *we are concerned that Enbridge's overall approach to the long term integrity plan is largely an extension of its past practice of on-line inspections and spot repairs and will not fully accomplish the purpose of the [Corrective Action] Order [as amended] to ensure that additional failures do not occur in the long term.*

* * *

² This ALJ notes that "Enbridge Energy Partners, Ltd." was the entity identified in Exhibit S-1 as subject to the investigation of PHMSA. This ALJ further notes that Exhibit S-2 is correspondence from PHMSA to "Enbridge Energy Partners, L.P." It is unclear to this ALJ if there is confusion regarding the actual identity of the Enbridge "suite of companies" which is responsible for Line 6B or if the entities have changed names and legal status. There was similar confusion expressed by intervenor, Wendy Turner, in her questioning of witnesses at the time of cross-examination – which, to some extent, was not resolved by the testimony of Enbridge witnesses.

[B]ased on the number, growth rates, and characteristics of Line 6 B anomalies, it may not be possible to adequately prevent failures in the long term by continuing to repair excessive number of defects in a given area. The Plan submitted on September 26, 2010, however, does not include criteria and an adequate process for considering pipe replacement as a long term solution to such integrity threats. . . PHMSA believes it will likely be necessary for Enbridge to replace portions of Line 6B to accomplish the purpose of the Order to provide confidence in the prevention of failures long term.

Enbridge shall continue to complete actions required by the [Corrective Action] Order [as amended]. However, the Plan submitted on September 26, 2010, and specifically section 3.6, is not acceptable to PHMSA in its current form. *Enbridge should submit a revised Plan specifying additional measures, including hydrostatic testing, criteria and procedures for replacing pipe where appropriate, and any other actions deemed necessary by Enbridge.* (Emphasis added).

Exhibit S-2.

Based on the foregoing, it appears that PHMSA had concerns over the integrity of the remaining Line 6B after the Marshall rupture and, thereafter, directed Enbridge to investigate the integrity of the same. It further appears that PHMSA directed Enbridge to go beyond its proposed plan to ensure the integrity of Line 6B, by directing pipe replacement as a more appropriate manner to manage the integrity of Line 6B.

II.

HISTORY OF PROCEEDINGS

On August 12, 2011, pursuant to 1929 PA 16; MCL 483.1 *et seq* and Rule 601 of the Commissions' Rules of Practice and Procedure (R 460.17601), Enbridge filed its Application, with supporting testimony and exhibits, requesting

approval to replace, construct, and operate a segment of the Line 6B pipeline for the transportation of crude oil and petroleum over a 50-mile segment of its Line 6B pipeline from its Stockbridge Pump Station in Ingham County to its Ortonville Station in Oakland County (Project). In its Application, Enbridge asserts that its request is being made as part of its Line 6B 2012 Maintenance and Rehabilitation Program (2012 Program). Enbridge further represents that the Project is a major component of the overall long-term integrity management program, which Enbridge is implementing for Line 6B's continued use in the transportation and delivery of crude oil supplies. Enbridge indicates that replacement of the portions of pipeline at issue is the preferred method of maintenance at this time based on the results of inspections and the anticipated number of integrity digs and repairs it is forecasting as necessary maintenance over the next several years in order to maintain and manage the integrity of Line 6B. Enbridge asserts that the Project is in the public interest because it: (1) assures future reliable and safe deliveries of crude oil supply to the region; (2) provides a cost-effective solution that proactively addresses the future integrity needs of Line 6B; and (3) minimizes impacts to landowners, local communities, and the environment by reducing the number of future digs that would otherwise be needed in this segment of Line 6B. Enbridge further asserts that the Project is necessary, just, reasonable, and in the public interest.

Pursuant to due notice, a prehearing conference was held in this matter on September 21, 2011, before Administrative Law Judge Theresa A. Sheets (ALJ Sheets). During the course of the prehearing, ALJ Sheets established a

schedule for this case and granted intervenor status to Wendy Turner (Intervenor Turner). Staff also participated in the proceedings. Eight (8) written statements were filed pursuant to R 460.17207 by the public; four (4) of the people who filed written statements also appeared and provided oral statements at the time of the prehearing conference. Ten (10) additional people appeared at the prehearing conference and also provided oral R 460.17207 statements.³

On October 14, 2011, Jerry Jung, as Trustee of the JM Jung Revocable Trust (Intervenor Jung), through his counsel, Ackerman Ackerman & Dynkowski, filed the Petition of Jerry Jung (JM Jung Revocable Trust) to Intervene out of Time (Intervenor Jung).⁴ Enbridge filed an Objection to the Petition on October 28, 2011, and Intervenor Jung filed a reply on October 31, 2011. A hearing was held on the Intervenor Jung's petition to intervene on November 1, 2011, and the petition was granted.⁵

On November 14, 2011, Enbridge filed a Motion to Substitute Witness Micah "Mike" J. Harris and his prefiled testimony and exhibits for that of Douglas B. Aller. On November 16, 2011, Intervenor Jung filed a response to Enbridge's motion which did not object to the substitution, but requested 30 days to evaluate the testimony of Mr. Aller. At a hearing held on the motion on November 23, 2011, Enbridge's motion was granted. At that time, Enbridge was

³ Among those who appeared at the prehearing conference to provide an oral public comment was Douglas Kelly, who appeared on behalf of the Ingham County Drain Commissioner, Patrick Lindemann. Mr. Kelly spoke of difficulty the Ingham County Drain Commission had in previous interactions with Enbridge personnel.

⁴ Attorney Dynkowski was present at the prehearing conference. 1 Tr 52.

⁵ On September 22, 2011, Mid-Michigan Properties, Ltd., through its counsel, filed a Petition for Delayed Leave to Intervene. This petition was never noticed for hearing or granted.

instructed to provide Intervenor Jung with any information about Mr. Aller⁶ and his qualifications by the time of the evidentiary hearing, if requested by Intervenor Jung. 3 Tr 95-96.

An evidentiary hearing was held on December 1, 2011, before ALJ Sheets. In the course of that hearing, testimony was provided by four (4) witnesses for Enbridge: (1) Richard L. Adams (Vice President of U.S. Operations for Enbridge); (2) Paul Meneghini (Supervisor, Environmental Projects (US) and Environmental Project Lead); (3) Thomas Hodge (Project Director); and (4) Douglas B. Aller (Lands and Right-of-Way Project Manager). Testimony was also provided by one Staff witness, Travis Warner (Public Utilities Engineer in the Gas Operations Section of the Operations and Wholesale Markets Division of the MPSC). The prefiled testimony of Intervenor Turner and Intervenor Jung were bound into the record. Intervenor Jung waived cross examination and did not appear for, or participate in, the December 1, 2011, evidentiary hearing.

The resulting record consists of 291 pages of transcript and 9 exhibits, each of which was received into evidence. Pursuant to the schedule established for this case, initial briefs were filed by all parties on December 16, 2011, Intervenor Jung filed a reply brief on January 2, 2011, and Enbridge and Staff filed reply briefs on January 3, 2011.

On December 28, 2011, between the time the parties filed briefs and reply briefs, Intervenor Jung filed a Motion to Compel Responsive Answers to Intervenor Jung's First Discovery Requests dated November 23, 2011. A

⁶ Individual qualifications were the only substantive difference in the testimony of Mr. Harris and Mr. Aller

hearing was scheduled on Intervenor Jung's motion for January 17, 2012. On January 12, 2012, Enbridge filed a response to Intervenor Jung's motion. The hearing scheduled for January 17, 2012, was subsequently cancelled based on Intervenor Jung's request that the hearing be cancelled and that ALJ Sheets make a ruling on the motion in writing based on briefs. ALJ Sheets will be addresses the ruling on this motion in this PFD.

On January 23, 2012, Jeffrey and Renee Axt filed a Petition to Intervene in this matter. On January 27, 2012, the Axts, through their counsel, filed an Amended Petition to Intervene. On February 9, 2012, Enbridge filed a response opposing the petition. A hearing on the Axts' Petition was scheduled for February 14, 2012. At the request of the Axts, the hearing was subsequently cancelled and the Axts formally withdrew their Petition, as amended, pursuant to Withdrawal of Intervenor Jeffrey and Renee Axt filed February 16, 2012.

III.

TESTIMONY OF THE PARTIES

A. Need and Public Benefit of the Project

1. Enbridge's Testimony and Exhibits

Richard L. Adams, Vice President of Enbridge's U.S. Operations testified regarding the public necessity and benefits of the Project. Mr. Adams sponsored Exhibit A-1 (an overview map of the 2012 Program), and A-6 (a list of other

utilities providing the same or similar services as that of Enbridge) in support of his testimony.

According to Mr. Adams, the Project will not change the nature of the transportation service furnished by Line 6B. 4 Tr 112. He indicated that Line 6B will continue to be part of a common-carrier interstate crude oil pipeline transmission system which links regions in North America where crude oil is produced with refineries that produce crude oil into the petroleum products used by consumers and businesses in Michigan and the surrounding regions. 4 Tr 112-113. When the Project is complete, Enbridge will continue to own and operate the Line 6B pipeline facilities. *Id.*

According to Mr. Adams, the scope of the Project was based on two major considerations. First, was the results of additional in-line inspection tool runs conducted on Line 6B, which identified certain segments of pipeline where a cluster of features exist that, over time, will require ongoing monitoring, mitigation, and correction. 4 Tr 114. Second, was the anticipated number of integrity digs and potential repairs that Enbridge forecasted as necessary maintenance over the next several years in order to maintain and manage the integrity of Line 6B. *Id.*

After explaining the elements that are considered in integrity assessments, Mr. Adams testified that Enbridge has identified certain sections of Line 6B that are expected to require a high number of investigative digs and repairs in subsequent years. 4 Tr 117-118. Mr. Adams indicated that replacement of Segments 6 and 7 of Line 6B is in the public interest because, when compared to

performing numerous future repairs, replacement with new pipe will be less disruptive to land owners and local communities, will minimize impacts on the environment and will assure ongoing crude petroleum transport to refineries. 4 Tr 119.

Mr. Adams stressed that completing the replacements as proposed provides an opportunity to plan for the necessary pipeline outages required to tie the new segments into the existing pipeline. 4 Tr 119-120. He testified that unplanned or repeated outages are very disruptive to refineries which have only a few days of crude oil stock on hand. 4 Tr 120. This, according to Mr. Adams, creates disruptions in the supply of refined petroleum products to the public, such as gasoline, jet fuel, asphalt for road projects, or petrochemical feedstock to the manufacturing industry. *Id.* He indicated that Michigan consumers and its manufacturing and transportation industries rely upon petroleum for approximately one-third of their energy needs. *Id.* Mr. Adams testified that there is no other high-capacity crude transportation system available to the region to connect to the same sources of production. 4 Tr 121.

Overall, Mr. Adams testified that the Project will also benefit Michigan economically by employing Michigan workers in construction jobs, reducing unemployment in the area, and bringing a demand for goods and services generated by the workforce's need for food, lodging, and supplies.⁷ 4 Tr 122.

⁷ Enbridge expects to purchase some of the materials necessary for construction of the Project locally, including consumables, fuel, equipment, and miscellaneous construction-related materials. 4 Tr 122.

2. Staff's Testimony and Exhibits

Travis Warner, Public Utilities Engineer in the Gas Operations Section of the Operations and Wholesale Markets Division of the Michigan Public Service Commission testified on behalf of Staff. In support of his testimony, he sponsored Exhibits S-1 (Pipeline and Hazardous Materials Safety Administration – PHMSA – Corrective Action Order, as amended, in Case No. 3-2010-5008H which relates to the rupture of Line 6B in the Marshall area and contains directives for further evaluation of Line 6B), Exhibit S-2 (November 1, 2010, correspondence from PHMSA to Enbridge regarding its Integrity Verification and Remedial Work Plan), and Exhibit S-3 (a chart depicting the cause of significant incidents for onshore hazardous liquid pipelines).

Mr. Warner testified that integrity issues such as internal and external corrosion, material defects, or previous damage due to excavation or other outside forces can be mitigated if Enbridge is allowed to construct the segment of Line 6B as requested. 4 Tr 275. He further testified such integrity issues can be contributory factors in incidents such as those set forth on Exhibit S-3, noting that the leading cause of incidents are corrosion and material/weld/equipment failures. *Id.* Mr. Warner agreed with the testimony of Mr. Adams and testified that replacement is a better alternative to continuous repairs for future integrity of the pipeline. 4 Tr 276. He pointed out that PHMSA has recommended that Enbridge replace certain segments of Line 6B and if Enbridge does not replace the pipeline and, instead, opts for repair, Enbridge would “routinely be in the right-of-way, causing ongoing long-term issues for landowners.” 4 Tr 276. Mr.

Warner further noted language in Exhibit S-2 wherein PHMSA, the federal regulatory agency responsible for inspection of the construction and continued operation and maintenance of the proposed pipeline, states, “PHMSA believe it will likely be necessary for Enbridge to replace portions of Line 6B to accomplish the purpose of the Order to provide confidence in the prevention of failures in the long term.” 4 Tr 274-275. Thus, replacement, and not repair, as a future plan to prevent failures has been strongly suggested, if not implicitly mandated by PHMSA.

B. Design and Construction of the Project

1. Enbridge's Testimony and Exhibits

Thomas Hodge, Project Director, testified in support of the design and construction of the Project. According to Mr. Hodge, he has oversight responsibilities for the coordination and management of the Project Execution Team to ensure timely development, permitting, design, and construction of the replacement segments. 4 Tr 184. In support of his testimony, Mr. Hodge sponsored Exhibit A-2 (Project Description with related Project Vicinity Maps); Exhibit A-3 (United States Geological Survey topographical maps which demonstrate the considered variations anticipated for the pipeline)⁸; Exhibit A-4 (Enbridge's Design and Construction Specifications); and co-sponsored Appendix A of Exhibit A-5 (Environmental Impact Report).

⁸ The exact locations and reasons for variations are set forth in Exhibit A-5 in Table 2.4-1 on page 20 of said report. A full analysis of each variation is set forth in Exhibit A-5, section 2.4 Route Variations, pages 20 through 26. As noted in Exhibit A-5, however none of Variations A through H are being incorporated into the Project.

According to Mr. Hodge, Enbridge does not propose to make any modifications to its pump stations or its terminal facilities as part of the Project. 4 Tr 189. Mr. Hodge presented testimony regarding pipeline specifications for the Project, indicating that the Applicable design codes that will be followed will be 49 CFR Part 195 and applicable national technical standards. 4 Tr 189, Table No. 6.

According to Mr. Hodge, Enbridge will need to acquire additional permanent and/or temporary right-of-way easements along portions of the Project to ensure safe distance from the active line or other facilities during construction and provide for sufficient room for future maintenance and operation of the newly replaced segments and nearby pipeline. 4 Tr 191. For Segment No. 6, Enbridge plans to acquire 25 feet of new right-of-way easements located immediately adjacent to and abutting its existing Line 6B right-of-way. 4 Tr 191-192. For Segment No. 7, Mr. Hodge testified that there are no adjoining pipelines or utilities along the Line 6B route east of Howell and, generally, there is sufficient space within the existing permanent easement for construction and future maintenance of the new pipe. 4 Tr 192. Thus, Mr. Hodge suggested that along Segment No. 7, Enbridge believes that, with a limited number of exceptions, it has sufficient room to install replacement pipe within its existing permanent right-of-way. *Id.* Enbridge generally plans to maintain a 25-foot offset or buffer from its existing Line 6B and the new pipeline. *Id.*

Mr. Hodge testified that there may be areas along the Project where (1) extra temporary workspace is needed to avoid encroachments near the

existing pipeline or certain land or environmental features; (2) where encroachment within or immediately abutting Enbridge's existing permanent right-of-way will require Enbridge to increase its depth of cover by 12-inches, since the new pipeline will be within 50-feet of a residence or building structure; and/or where (3) in limited situations, a route deviation may be necessary to address a special landowner requirement or avoid special land or environmental features. 4 Tr 192.

Mr. Hodge also testified that Enbridge evaluated a number of possible route alternatives along the Project, as also discussed by Mr. Meneghini in his testimony. He too testified that Enbridge evaluated alternatives such as no-action, repair versus replacement, system alternatives, route variations, alternative energy sources and energy conservation. 4 Tr 193-194. He indicated that the criteria used to evaluate potential alternatives included: (1) whether an alternative offers a significant environmental advantage over the Project; (2) whether an alternative is technically and/or economically feasible and practical; and (3) whether an alternative meets Enbridge's stated project objectives. 4 Tr 194. Mr. Hodge said that the project is the most environmentally acceptable and is the most practical route from an engineering, construction, and operational aspect, and also takes into consideration the minimization of impacts and inconveniences to affected landowners. *Id.* He noted that the route deviations that Enbridge evaluated for the Project are shown on Exhibit A-3, the topographical maps. *Id.*

With regard to the deactivation of the existing pipeline, Mr. Hodge testified that it is common in the industry to fill a deactivated pipeline with nitrogen. 4 Tr 214. He also indicated that the decision to fill a deactivated pipeline with nitrogen or water or to remove such a line depends on the directives of the regulatory agency involved in the project. 4 Tr 219.

2. Staff's Testimony and Exhibits

Travis Warner again testified on behalf of MPSC Staff regarding design and construction of the Project. According to Mr. Warner, when reviewing the several proposed alternative routes along Line 6B, he considered the "potential route deviations" to be "relatively minor," noting that "[i]ndividually, each deviation is less than 1 mile from the existing Line 6B route." 4 Tr 277. He testified that Staff agrees with Enbridge's proposal to construct the replacement segment along the existing Line 6B. *Id.* Although Mr. Warner acknowledges that "there are situations that will be inconvenient for landowners," he goes on to say, "Staff believes that [replacement of the pipeline] is the most logical option from the perspective of long-term environmental and land-owner impacts." 4 Tr 277. Mr. Warner indicated that Staff is aware that, in several instances, buildings have been constructed near the existing Line 6B since its original construction. *Id.* Thus, he pointed out that in some cases, the replacement segment will need to be closer to these buildings than would normally be ideal. 4 Tr 277-278. He said out that, "[t]hese instances are limited and Staff believes that Enbridge will address them with the affected landowners on a case-by-case basis if feasible alternatives exist." 4 Tr 278. He noted the testimony of Mr. Hodge, who testified

that “a route deviation may be necessary to address a special land owner requirement or avoid special land or environmental features.” 4 Tr 278.

C. Environmental Impact of Project

1. Enbridge's Testimony and Exhibits

Paul Meneghini, Supervisor, Environmental Projects (US), testified regarding the environmental impact of the Project. According to Mr. Meneghini, he is a member of the Enbridge Project Execution team and is responsible for leading the resources Enbridge has engaged to conduct environmental surveys, environmental permitting, environmental impact analysis, and the identification of environmental mitigation and restoration techniques. 4 Tr 148. He managed oversight for the preparation of the Environmental Impact Report (EIR) and all related documents and appendices attached thereto, which was admitted into evidence as Exhibit A-5.

Mr. Meneghini testified that the environmental review for the Project was performed under his supervision and by a team of qualified experts in their respective fields, including wetland and wildlife scientists, archaeologist, and environmental specialists. 4 Tr 152. The area of land subject to environmental assessment was a 225-foot-wide corridor which was surveyed for wetlands, water bodies, sensitive habitats, and cultural resources. 4 Tr 153. Mr. Meneghini indicated that in areas where larger workspaces would be required, such as horizontal directional drill (HDD) staging areas, they expanded the survey corridor to include all likely necessary construction workspaces. *Id.*

Mr. Meneghini further testified that he and his staff compiled and evaluated the results collected from the desktop and field reviews to facilitate the preparation of the EIR (Exhibit A-5) and associated Project permitting. 4 Tr 152.

Mr. Meneghini points out that the EIR (Exhibit A-5), provides detailed discussions of items such as (1) construction techniques and sequence; (2) topsoil segregation; (3) construction near sensitive areas such as wetlands and water bodies; (4) temporary bridges over ditches and water bodies; (5) construction within cropland areas; (6) extra workspace; and (7) restoration of disturbed areas. 4 Tr 155; Exhibit A-5.

Mr. Meneghini addressed the workspace needed for the Projects as follows:

- a. Construction for the proposed pipeline will generally require up to 105 feet in width for the construction corridor;
- b. Extra workspaces (necessary for temporary storage of excavation spoils and, in case of horizontal directional drill areas, equipment set-up and pipe handling areas) will be used only as necessary as discussed in the EIR;
- c. Construction workspace will be reduced to 80 feet in width when crossing wetland areas;
- d. The pipeline will be directionally drilled under a major water body crossing such as Shannon Lake crossing;
- e. Topsoil will be segregated by the grading crew in agricultural and residential area and in non-saturated wetlands;
- f. Environmental controls will be installed to minimize erosion;
- g. Final grading and clean-up crews will establish the final grade of the right-of-way and return topsoil, repair drain tile as required, reseed where appropriate, and otherwise restore the Project area

as best as practical and as required under applicable federal, state and local permits.⁹

4 Tr 155.

Mr. Meneghini stressed that the key environmental concerns of the Project include (1) temporary wetland and water body impacts; (2) potential impacts on sensitive species, specifically the Indiana bat; (3) temporary construction impacts on agricultural lands; (4) tree clearing; (5) construction near residential properties; and (6) ensuring proper restoration. 4 Tr 157. According to Mr. Meneghini, the EIR discusses each of these concerns and identifies the measures that will be implemented to avoid or minimize impacts on these resources. *Id.* He further stated that, “Enbridge will continue to consult with agencies and landowners regarding these concerns.” *Id.*

With regard to the inactive pipeline that will remain in the ground after the replacement pipeline is tied in, Mr. Meneghini testified that the pipe will be deactivated or out of service, but will continue to be maintained in accordance with 49 CFR 195 regulations. 4 Tr 163. He explained that nitrogen is put in the deactivated pipeline at a very low pressure once the ends of the pipeline are capped, and that pressure is monitored annually to make sure that the integrity of the pipeline is maintaining that very low level of nitrogen pressure on that line.

⁹ The restoration of the land was a significant concern of those who submitted Rule 207 statements in this matter. Some of those who spoke indicated that restoration of areas disturbed during integrity digs by Enbridge caused significant problems for some land owners including ongoing flooding problems and pipe that remains above grade. While the comments are not evidentiary for purposes of this case, this ALJ suggests that the standard Enbridge has set for itself of restoring property “as best as practical” may be missing the quality mark and an invitation for it to provide minimum attention, at best, to restoration efforts. “Returning topsoil” is likely not going to return the property to its previous state, repairing drain tile “as required” invites an interpretation by a contract land services agent that such repair is not required, etc. This ALJ further notes that those who expressed concern in Rule 207 statements overwhelmingly referenced more the manner in which they were treated during other digs and restoration and potential sub-standard restoration, and less concern about the decision to actually replace the pipeline – which is, again, not evidence, but worthy of note.

Id. He described the nitrogen as “an inert gas . . . harmless intern gas. “ 4 Tr 164. He also represented that it is not a threat to the environment at all if the deactivated pipeline was breached. 4 Tr 166. He did, however, represent that if there was a nitrogen leak, an investigation would commence to identify the source of the leak and it would be repaired. 4 Tr 174. Finally, Mr. Meneghini testified that removing the deactivated pipeline would cause more impact on the environment and landowners than leaving it in the ground and filling it with nitrogen. *Id.*

The Environmental Impact Report, admitted into evidence as Exhibit A-5, sponsored by Mr. Meneghini, is a summary of the entire project. It sets forth a variety of information ranging from the location, purpose, and need of the Project to areas of environmental concern. See Exhibit A-5.

2. Staff’s Testimony and Exhibits

Travis Warner, on behalf of Staff, testified, “Staff believes that the project will cause minimal impact to the environment if constructed and operated as proposed in the Environmental Impact Report, Exhibit A-5.” 4 Tr 277. He noted that, “[f]rom an environmental standpoint, the replacement segment will be in or adjacent to existing right-of-way for its entire length. These are areas that have previously been disturbed due to the original construction of the existing Line 6B.” *Id.* He further testified, “if Enbridge were forced to create a new corridor for this replacement, 60 feet of new right-of-way would likely be needed as opposed to the additional 25 feet proposed for this project.” *Id.*

Mr. Warner testified that Staff believes Enbridge's policies for right-of-way cleanup, as set for the in the Environmental Impact Report, Exhibit A-5, adequately address right-of-way restoration. 4 Tr 279.

D. Right-of-Way Requirements for the Project

1. Enbridge's Testimony and Exhibits

Douglas B. Aller, Lands and Right-of-Way Project Manager testified in support of the right-of-way requirements for the Project. Mr. Aller testified that he is responsible for supervising work associated with review and scoping of land appraisal information, pipeline easement land titles, survey notifications, and constructability review. 4 Tr 230. He is also responsible for determining easement and other land use needs for the Project, such as supervising and assisting Project right-of-way agents with negotiations and acquisitions, as well as overseeing the preparation/communication of various rights-of-way documents. 4 Tr 230-231. In support of his testimony, Mr. Aller co-sponsored Appendix A of Exhibit A-5 (Environmental Mitigation Plan of the Environmental Impact Report).

According to Mr. Aller, Enbridge plans to acquire new permanent and/or temporary right-of-way easements adjacent to the existing right-of-way for Line 6B in Ingham, Livingston and Oakland County. 4 Tr 232. He testified that this will enable Enbridge to establish a buffer between the newly installed pipeline segment and the existing pipeline(s) along portions of the route where additional space is needed. *Id.* He said that the additional right-of-way and alignment of

the new pipeline will also create some buffer during construction between the new pipeline segment and other encroachments located within or immediately adjacent to Line 6B's permanent right-of-way. *Id.* Finally, he indicated that the acquisition of additional permanent right-of-way provides the needed space for the safe construction, inspection, maintenance, and operation of the pipeline today and in the future. *Id.*

Mr. Aller testified that the following was planned:

Segment 6 – Stockbridge to Howell

- a. Acquisition of 25 feet of new permanent right-of-way easements located immediately adjacent to, and abutting, Line 6B's permanent right-of-way easements from Stockbridge Pump Station and Terminal Facility at Mile Post 650.64 to its Howell Pump Station at Mile Post 678.70. 4 Tr 232-233.¹⁰
- b. Use of a typical construction footprint of 105 feet in upland areas, consisting of 20 feet of existing right-of-way and 25 feet of new permanent right-of-way easement, along with 60 feet of temporary construction workspace. *Id.*
- c. Use of an 80-foot construction footprint in wetland areas, consisting of 20 feet of existing right-of-way and 25 feet of new permanent right-of-way easement, along with 35 feet of temporary construction workspace. *Id.*

Segment 7 – Howell to Ortonville Station

- a. Acquire limited new right-of-way, since there are no adjoining pipelines that share the pipeline corridor with Line 6B from the Howell Pump Station at Mile Post 678.7 to the Ortonville Station at Mile Post 701.14. *Id.*
- b. Use of a construction footprint that is 105 feet in upland areas, consisting of 40 feet of existing permanent right-of-way easement and 65 feet of temporary construction workspace. *Id.*

¹⁰ This is needed because Line 6B shares a pipeline corridor with the permanent right-of-way easements of other pipelines located along this 28-mile segment. 4 Tr 233.

- c. Use of an 80-foot construction footprint in wetland areas, consisting of 40 feet of existing permanent right-of-way easements and 40 feet of temporary construction workspace. *Id.*

In addition to the above, Mr. Aller testified that, in limited locations, there may be slight deviations from the existing right-of-way due to encroachments, land use, or constructability issues. 4 Tr 234. He indicated that the route deviations considered are shown on the topographical maps (Exhibit A-3). 4 Tr 234. Exhibit A-3 indicates 8 possible variations (labeled Variation A through Variation H on the maps). See Exhibit A-3. However, Exhibit A-5 analyzes each possible variance and indicates that Enbridge does not intend to incorporate any of the variations into the Project. See Exhibit A-5, pp 20-26.

Mr. Aller described the right-of-way easements for the existing pipeline and any new right-of-way easements that will be required for this project. 4 Tr 234-235. He also discussed additional construction workspace that may be required for the Project. He testified that there will be certain areas along Segments 6 and 7 where extra temporary workspace will be needed to avoid encroachments near the existing pipeline or to accommodate construction techniques for certain land or environmental features. 4 Tr 235-236. For example, he stated that extra temporary workspace may be required at roadways, railroad crossings, and for the river crossings where pipe will be installed using horizontal directional drill equipment. 4 Tr 236. Additional temporary workspace for contractor or pipe and material storage yards or for gate valve or facility land development may also be required. *Id.* He indicated

that Enbridge will work with affected landowners to make those adjustments for extra temporary workspace on a case-by-case basis. *Id.*

2. Staff's Testimony and Exhibits

Travis Warner, on behalf of Staff, testified that Staff believes that Enbridge's proposed permanent right-of-way and temporary work space is adequate and reasonable. 4 Tr 278-279. Staff agrees with Enbridge that the 25 feet of additional easement will ensure a safe working distance from the existing Line 6B and allow Enbridge to inspect and maintain the replacement segment in the future. 4 Tr 279. Further, he testified,

"Staff is in agreement with the proposed temporary workspace. Staff is aware that certain construction techniques, such as directional drilling, will require more work space." 4 Tr 279.

IV.

POSITION OF THE PARTIES

A. Enbridge

In its Initial Brief, Enbridge argues that the investigative dig program for Line 6B identified the need for a high number of repairs in subsequent years that are clustered in certain geographical areas along Segment Nos. 6 and 7. Enbridge Initial Brief p 11 (citing 4 Tr 118). It is Enbridge's position that, based on the anticipated number of future investigative digs and repairs needed, replacing Segments 6 and 7 of Line 6B is in the public interest as it is the most

efficient and cost-effective solution for maintaining the integrity of Line 6B. Enbridge Initial Brief p 11 (citing 4 Tr 119). It maintains that when compared to performing a high number of future repairs, replacing Segments 6 and 7 with new pipe will be less disruptive to landowners and local communities, while minimizing environmental impact. *Id.* Enbridge argues that pipe replacement is the preferred method of repair in Segments 6 and 7 because it (i) reduces the number of intrusive investigative digs and repairs, and results in fewer disruptions to landowners; (ii) is the safe and cost-effective alternative for shippers on the system; and (iii) replaces those pipe sections with state-of-the-art pipe and coating. Enbridge Initial Brief p 11. Enbridge points out that it evaluated several alternatives to the Project, including no action, system alternatives, repair versus replace alternative, route variations, and alternative energy and conservation alternatives and determined that replacement was the preferred method. *Id.*

Enbridge also argues that Line 6B serves a critical role in meeting Michigan's Energy needs. It asserts that with no other high-capacity crude transportation system available to the region to connect to the same sources of production, it is important that Enbridge maintains its Line 6B to ensure reliable, safe, and economical crude oil delivery both to Michigan's refinery and to refineries in nearby states and providences that, in turn, produce gasoline and other petroleum-based products for Michigan consumers and businesses. Enbridge Initial Brief p 13. Enbridge also argues that the Project will bring additional economic benefit to the state of Michigan in the form of construction

jobs, increased payroll taxes, purchase of materials, consumables, fuel, equipment, and demand for other goods and services. Enbridge Initial Brief p 13-14.

Enbridge states that the proposed pipeline route is reasonable because the Project is an integrity-driven maintenance project of an existing pipeline, which follows the path of the existing pipeline, and the design of the pipeline will meet or exceed current safety standards. Enbridge Initial Brief p 14-15.

Enbridge argues that no other party presented any evidence refuting the need to replace Segments 6 and 7 as the best method to maintain the integrity of Segments 6 and 7.

B. Staff

Staff supports Enbridge's application. Staff notes that in July, 2010, Line 6B failed and Enbridge was ordered by federal authorities (PHMSA) to evaluate the integrity of the remainder of the pipeline. Staff Initial Brief p 7. Staff points out that Enbridge complied with the order and applied for authority under PA 16 of 1929, to replace the section of the pipeline that runs from Stockbridge to Ortonville by placing thirty-inch pipe parallel to the existing pipeline. *Id.* Staff agrees that replacing the pipeline will mitigate integrity issues caused by corrosion, defects, or previous damage and that all of these items are contributing factors toward pipeline failure. *Id.* Finally, Staff agrees that replacement is the option that would minimize the overall impact to the landowners and environment. *Id.*

C. Intervenor Turner

Intervenor Turner argues that, “[a]pplicant Enbridge Energy Ltd Partnership [] is seeking authority from the Michigan Public Service Commission [] for the construction of a new crude oil pipeline and wrongfully stating that such authority would also grant them the right to exercise eminent domain.” Turner Brief p 1. She continues by saying that Enbridge is “confusing authority to construct a hazardous materials pipeline within this state with authority to seize the property of landowners.” *Id.*

Intervenor Turner takes the position that the law of the state of Michigan does not authorize condemnation for the construction or operation of crude oil pipelines in Michigan by a private entity such as Enbridge. *Id.* She seeks to distinguish between crude oil and petroleum saying that “[c]ondemnation is provided for in section 483.2 for petroleum only, not crude oil.” *Id.* She states that “Enbridge’s application attempts to address the (sic) two materials synonymously whereas our legislature clearly did not.” *Id.* Intervenor Turner continues by stating that Rule 460.17601 of the Michigan Public Service Commission’s Rules of Practice and Procedure provides for the submission of an application for the construction of a crude oil pipeline but “does not provide any authority whatsoever for a private enterprise to exercise eminent domain and condemn the property of affected landowners.” Turner Brief p 2. She continues by arguing,

“Rule 601 allows an applicant to seek authority for the construction of a hazardous materials pipeline because there is no federal oversight of this step of the crude oil transportation. The U.S.

Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) oversees the operation and transportation of crude oil through pipelines, it does not oversee the construction of new crude oil pipelines. The Federal Energy Regulatory Commission ("FERC") further disclaims any responsibility for the oversight of the construction of oil pipelines."¹¹

Turner Brief p 2.

Intervenor Turner acknowledges that "the Commission has the authority to approve an application submitted under Rule 601 but nothing whatsoever in this rule provides for the taking of private property." *Id.*

Intervenor Turner argues that Enbridge "fails to provide any details regarding the timeframe of use for the proposed pipeline," and claims that the timeframe is relevant due to an arrangement between Enbridge and a Native American reservation owned by the Fond du Lac Band of Lake Superior Chippewa. *Id.* This information was not made part of the record and she attached a document to her brief in support of her argument that, similarly, was not offered as evidence by Intervenor Turner or otherwise made part of the evidentiary record. She does not claim to be part of the Fond du Lac Band of Lake Superior Chippewa, which is apparently part of the purported agreement and does not indicate the manner in which this information, which is not part of the evidentiary record, affects her as a landowner or affects or impacts Line 6B.

Intervenor Turner requests that the Commission "delay granting authority for the project until the necessary land access rights have been secured. Alternatively, any interim authority granted by the Commission should specifically state that it does not grant any rights of eminent domain." Turner Brief p 3.

¹¹ No testimony or evidence was presented by FERC in support of Intervenor Turner's assertion.

D. Intervenor Jung Trust

Intervenor Jung also challenges the Enbridge Application. Intervenor Jung argues that, “pursuant to the original easement, and pursuant to Michigan case law, Enbridge should properly cease operation of the unsafe pipeline, remove the unsafe pipeline and replace it with a safe pipeline for the transmission of crude oil.” Jung Initial Brief p 2. Intervenor Jung, like Intervenor Turner, focuses on the Project and challenges the application based largely on the theory of condemnation. He argues that,

“if there is truly a concern over safety of the existing pipeline, Enbridge would not seek to continue operating an unsafe pipeline. Enbridge is merely using this claimed safety concern as a thinly-veiled attempt to gain access to property that it is otherwise not entitled to for purposes of inflating its profits. The Michigan Constitution does not allow takings of private property for economic purposes. Likewise, Michigan eminent domain jurisprudence does not permit takings in excess of that actually needed for the project. . . . Enbridge clearly does not need to take any of Intervenor Jung’s property for purposes of replacing a failing pipeline. Therefore, the only purpose of this excess taking is for Enbridge’s own economic welfare. Under either scenario, this Commission should properly deny Enbridge’s request, require Enbridge to cease operation of the failing system and replace the current system with a safe system for transmitting crude oil without exceeding the limitations of the original pipeline easement.”

Jung Initial Brief p 3-4.

Mr. Jung then presents an extensive citation on the power of eminent domain, the standards under which the Michigan courts can exercise the power of condemnation and the burden of proof relative to the same.

E. Replies

1. Enbridge

Enbridge replies to Intervenor Turner by arguing,

Ms. Turner [] did not directly address the public need for the pipeline, the reasonableness of the pipeline route or the safety and engineering design of the proposed pipeline. Instead, Ms. Turner attempts to raise a collateral challenge to the right of condemnation by eminent domain granted by the Michigan Legislature to pipeline companies pursuant to MCL 483.2.

Enbridge Reply Brief p 2.

Enbridge calls Intervenor Turner's differentiation between petroleum pipelines and crude oil pipelines "erroneous" citing 49 CFR 195.2, which defines "petroleum" as "crude oil, condensate, natural gasoline, natural gas liquids, and liquefied petroleum gas." Enbridge Reply Brief p 4-5. Enbridge also argues that the Commission expressly rejected the distinction between petroleum and crude oil in MPSC Case U-16450.

Additionally, Enbridge challenges Intervenor Turner's assertion that PHMSA does not have authority over the construction of the pipeline, calling the argument "erroneous" and pointing to 49 CFR 195.200-266 and the testimony of Travis Warner (4 Tr 272-274) in support of its argument that PHMSA does have such authority. Enbridge Reply Brief p 7.

As a side note, Enbridge points out that the letter attached by Ms. Turner to her Brief relating the Fond du Lac Band of Lake Superior Chippewa reservation, while not properly in evidence, relates to a different pipeline owned by Enbridge and is not directly related to Line 6B. Enbridge Reply Brief p 8.

Similar to Intervenor Turner, Enbridge replies to the arguments of Intervenor Jung by stating that the Intervenor Jung does not challenge the reasonableness of the route or the pipeline's design, but only challenges the public need, without any citation to any portion of the evidentiary record. Enbridge Reply Brief p 8. Enbridge argues that Intervenor Jung's argument that the Project is not needed if it is safe ignores the evidentiary record, which establishes that while the existing pipeline is safe, it needs maintenance. Enbridge Reply Brief p 8. Similarly, Enbridge argues that Intervenor Jung's alternative suggestion that the Commission should order the immediate shutdown of the existing pipeline, its removal, and then replacement with a new pipeline is "irresponsible folly and would, among other things, result in extreme hardship to the public." Enbridge Reply Brief p 10. Enbridge challenges the Commission's legal authority to shut down the pipeline. *Id.* It further cites a lack of witness testimony or other evidence in the record to support the feasibility of shutting down Line 6B and, in fact, argues that a shutdown would result in "an economic calamity to the state of Michigan and the surrounding region." *Id.* Enbridge states that Intervenor Jung's claim that the proposed Project serves only Enbridge's private financial interest and serves no public purpose is contradictory to the evidentiary record, citing *Greyhound Corp v Michigan Public Service Commission*, 360 Mich 578 (1960) wherein the court found that a common carrier, such as Enbridge, is one who holds himself out to the public for the transport of property for all such as may choose to employ him and he has an "obligation . . . to serve the public." Enbridge Reply Brief p 11. Finally, Enbridge

argues that Intervenor Jung's position that the amount of property needed for the Project is excessive, is unsupported by the record, pointing out that Mr. Hodge's testimony regarding the additional property needed for the safe construction, operation, and maintenance of the pipeline is "unrefuted and unchallenged." Enbridge Reply Brief p 12.

2. Staff

Staff replies to Intervenor Jung by arguing that, by statute, the MPSC is granted the authority to determine whether a project is in the public convenience and necessity. Staff Reply Brief pp 2-3. Staff goes on to state that the "MPSC itself does not engage in condemnation of property." *Id.* Staff takes the position that,

Under 1929 PA 16 and 1980 PA 87 the entity requesting the determination of public convenience and necessity must first receive that determination from the MPSC. MCL 213.56(3). Once that is obtained the private agency desiring to build the pipeline must proceed according to MCL 483.2. The railway act being superseded by The Uniform Condemnation Procedures Act, the private entity must then proceed in condemnation proceedings in court, with the MPSC's determination being prima facie evidence of public convenience and necessity.

Staff Reply Brief p 3.

Staff disagrees with Intervenor Jung's position regarding Enbridge's motivation for the replacement (i.e. solely for economic gain) and believes that Enbridge's plan is the best plan under the circumstances and is in the public convenience and necessity. Staff Reply Brief pp 3-4.

Staff replies to Intervenor Turner by disagreeing with her argument that 1929 PA 16 cannot be used for condemnation of property for crude oil pipelines, and agreeing with Enbridge that Intervenor Turner's interpretation that 1929 PA 16 applies to "petroleum" pipelines only and not "crude oil" pipelines, is too narrow an interpretation. Staff Reply Brief p 4. Staff further reiterates that Intervenor Turner's argument regarding condemnation is without merit because "other than making the determination of public convenience and necessity, the MPSC, having only the powers that the legislature has vested it with, does not have any powers to condemn property." Staff Reply Brief p 6. Finally, Staff argues that Intervenor Turner's assertion that PHMSA does not oversee the construction of new pipelines with without merit. Staff argues that the rules administered by PHMSA provide for inspection of pipelines during construction (citing 49 CFR 195.200). Staff Reply Brief, p 6. Staff further points out that inspections are required to be made by trained and qualified people according to PHMSA's regulations (49 CFR 195.204) and materials have to inspected before being installed in a pipeline (49 CFR 195.206). *Id.*

3. Intervenor Jung

The Jung Trust replies by arguing that "a cursory review of 1929 PA 16 does not authorize Enbridge, or any other utility, the right to exercise the power of eminent domain to acquire either the right of way for a crude oil pipeline, or for a temporary work space." Jung Reply Brief p 2. Intervenor Jung argues that Enbridge's failure to cite any legal authority to acquire property for a crude oil

pipeline, or for a temporary workspace, necessarily cause Enbridge's application to fail.

V.

LEGAL ANALYSIS AND FINDINGS

This matter was brought before the Commission pursuant to 1929 PA 16, MCL 483.1 *et seq* (Act 16) and Rule 601 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 460.17601.

MCL 460.1 *et seq* is "an act to provide for the regulation and control of public utilities and other services affected with a public interest within this state . . ." See preamble to MCL 460.1 *et seq*. Within MCL 460.1 *et seq*, the Michigan Public Service Commission was created and granted jurisdiction to regulate and control matters involving public utilities. MCL 460.6 (1) provides:

The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state . . . [and] is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operations, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, *oil*, gas, and *pipeline companies* . . . (emphasis added).

As it relates to petroleum and crude oil, Act 16 provides further defines the Michigan Public Service Commission's jurisdiction and powers by providing, in pertinent part,

There is hereby granted to and vested in the Michigan public utilities commission, hereinafter styles the "commission," the power to control, investigate and regulate every corporation, association or person, now or hereinafter exercising or claiming the right to carry or transport crude oil or petroleum, or any of the products thereof, by or through pipe line or lines, for hire, compensation or otherwise, or now or hereafter exercising or claiming the right to engage in the business of piping, transporting or storing crude oil or petroleum, or any of the products thereof, or now or hereafter engaging in the business of buying, selling or dealing in crude oil or petroleum within the limits of this state . . .

MCL 483.3.

Pursuant to its statutory grant of authority, the Michigan Public Service Commission promulgated the Public Service Commission Rules of Practice and Procedure Before the Commission, R 460.17101 *et seq* (Rules of Practice and Procedure). Included within the Rules of Practice and Procedure, are rules which define the manner in which carriers of petroleum and crude oil need to proceed if they wish to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute. R 460.17601 (Rule 601) provides:

- (1) An entity listed in this subrule shall file an application with the commission for the necessary authority to do the following:

* * *

- (c) A corporation, association, or person conducting oil pipeline operations within the meaning of the provisions of Act No. 16 of the Public Acts of 1929, being 483.1 *et seq.* of the Michigan Compiled Laws, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute

The Michigan Public Service Commission articulated the standard for approval of Act 16 application, such as the one at issue in this matter, in *In Re Wolverine Pipeline*, Case No. U-13225, Opinion and Order dated July 23, 2002 (*Wolverine Order*). The *Wolverine Order* provided, “Act 16 provides the Commission with broad jurisdiction to approve the construction, maintenance, operation and routing of pipelines delivering liquid petroleum products for public use.” *Wolverine Order* p 4. The Commission went on to state that, “the Commission will grant an application pursuant to Act 16 when it finds that the applicant has demonstrated a public need for the proposed pipeline and that the proposed pipeline is designed and routed in a reasonable manner, which meets or exceeds current safety and engineering standards.” *Wolverine Order* p 4-5. Thus, the determination to be made in the matter before the Commission involves the public necessity and convenience of the proposed pipeline project.

A. Public Need for the Proposed Pipeline

In this case, Enbridge and Staff assert that the Project is necessary for a variety of reasons including, in large part, the foreseeable need for a large number of investigative digs and repairs, causing more disruption to landowners than replacement of segments of Line 6B. This position is supported by the testimony of Richard Adams, Enbridge’s Vice President of U.S. Operations and was further supported by Staff witness, Travis Warner, a public utilities engineer.

Intervenor Turner presented no evidence in opposition to the public need for Enbridge's pipeline Project and presented no argument in opposition to the public need for Enbridge's pipeline Project.¹²

Similarly, Intervenor Jung presented no evidence in opposition to the public need for Enbridge's pipeline Project. While Intervenor Jung argues in his Initial Brief against the necessity of the Project, he does acknowledge that "[d]ue to admittedly shoddy construction of the original pipeline, significant sections of the current pipeline must be replaced for safety reasons to avoid additional breakages, seeps and spills along its route." Jung Initial Brief p 2. This seems to indicate an admission that there is, in fact, a need for the Project. Intervenor Jung calls for Enbridge to "properly cease operation of the unsafe pipeline, remove the unsafe pipeline and replace it with a safe pipeline for the transmission of crude oil." *Id.* Again, Intervenor Jung seemingly indicates that there is a need to replace the pipeline, but wants the pipeline fully replaced within the confines of the existing easement.

Based on the evidence placed on the record in this matter, along with the arguments of the parties, this ALJ finds the record supports Enbridge and Staff's position that there is a public need for the Project. This ALJ further notes that PHMSA's rejection of Enbridge's initial September 26, 2010 "Line 6B Integrity Verification and Remedial Work Plan" (Exhibit S-2), as set forth in its November

¹² While Intervenor Turner makes some vague reference to the reservation of the Fond du Lac Band of Lake Superior Chippewa and a purported easement on a Lakehead line to support that the Project is unnecessary, there is no evidence in the record that would make the reference relevant or otherwise applicable to the Application at issue. The purported lease agreement to her brief is an inappropriate attempt to make said lease a part of the evidentiary record. Because she did not have said lease agreement entered as evidence at the time of cross-examination, the same is not a part of the evidentiary record in this matter and is being disregarded by this ALJ for purposes of this Proposal for Decision.

1, 2010, correspondence to Enbridge (Exhibit S-2) is further evidence of the federal regulator's opinion that replacement is needed in this matter. In fact, the November 1, 2010, correspondence from PHMSA to Enbridge largely directs Enbridge to submit a "revised Plan specifying additional measures . . . and procedures for replacing pipe where appropriate" See Exhibit S-2. Based on this and other language set forth in Exhibit 2, this ALJ notes that it appears that PHMSA itself was steering Enbridge away from multiple repairs and toward replacement – an indication that the federal regulators themselves find replacement necessary.

B. Design and Route of Pipeline

The second issue to be addressed in determining whether or not to grant an Act 16 application is whether or not the proposed pipeline is designed and routed in a reasonable manner.

Again, both Enbridge and Staff argue that the design and route of the pipeline are reasonable. Thomas Hodge, Project Director, describes the route as the "superior route corridor" due to his view that the pipeline route minimizes unavoidable environmental impacts; is the most practical route from an engineering, construction, and operational aspect; and takes into consideration the minimization of the impacts and inconveniences to affected landowners. See 4 Tr 194. Staff witness, Travis Warner, agreed and testified that the route "is the most logical option from the perspective of long-term environmental and land-owner impacts." 4 Tr 277. This was based on his opinion that using the area adjacent to the existing right-of-way is best because it has already been

previously disturbed due to original construction and that a new corridor would require 60 feet of new right-of-way as opposed to the additional 25 feet proposed in some areas of this Project – causing minimal impact to the environment if constructed consistent with the Environmental Impact report.

Intervenor Turner presented no evidence or argument in opposition to the proposed design and route of the Project.

Intervenor Jung also presented no evidence in opposition to the proposed design and route of the Project. Intervenor Jung acknowledges that the “currently existing pipeline easement allows Enbridge to construct, remove and replace the existing pipeline . . . “ Jung Initial Brief p 2. Intervenor Jung, however, strenuously objects to the Project as it asserts that “Enbridge, in an attempt solely for its own economic benefit, has elected to permit unsafe existing pipeline to operate, indefinitely, while it constructs a new pipeline along the same corridor route.” *Id.* He goes on to say that “[t]he purpose of the instant application is not to permit Enbridge with the authority to construct the pipeline, but rather, to construct a second pipeline to avoid any economic downtime for Enbridge.” *Id.* Finally, Intervenor Jung suggests that the Commission should “properly protect the public by requiring Enbridge to fully replace the existing pipeline without regard to the profits Enbridge may make at the owner’s and general public’s expense.” Jung Initial Brief pp 2-3.

This ALJ finds that while the argument of Intervenor Jung references the route and corridor of the existing pipeline, it does not challenge the design or route of the pipeline Project. Intervenor Jung instead challenges the financial

motives of Enbridge, which is not part of the criteria to be evaluated in an Act 16 Application. Based on the testimony and evidence in the record, this ALJ finds that the design and route of the pipeline, as proposed by Enbridge, are reasonable.¹³

C. Safety and Engineering Standards

The final criteria to examine when determining whether to grant an Act 16 Application is whether the design and route of the proposed pipeline meets or exceeds current safety and engineering standards.

According to Enbridge witnesses Richard Adams and Thomas Hodge, the proposed pipeline will be designed, constructed, installed, tested, operated, and maintained to meet or exceed applicable pipeline safety requirements including, but not limited to, those specified in 49 CFR Parts 194 and 195, to protect the public health and safety and minimize the environmental impact. Enbridge Initial Brief p 15; 4 Tr 113 and 189. Pursuant to MCL 483.6, Enbridge also made an explicit authorized acceptance of 1929 PA 16, as amended. See Enbridge Initial Brief p 15; 4 Tr 125.

Staff points out that PHMSA's Office of Pipeline Safety would be the agency that would enforce safety regulations on the pipeline and would be

¹³ This ALJ agrees with Enbridge that PHMSA exercises authority over the operation of Line 6B and, thus, Intervenor Jung's suggestion that the Commission shut down Line 6B is not within the authority or power of the Commission. Further, this ALJ finds that the testimony and evidence in this matter does not support a shutdown of the pipeline. In fact, evidence and testimony indicates that outages (such as those created by numerous repairs and/or shutdown of the pipeline) are disruptive to refineries and, ultimately, disruptive to Michigan consumers and manufacturers who rely on the petroleum for energy and products. This ALJ finds that a shutdown of the pipeline as suggested by Intervenor Jung would create the exact opposite effect as that suggested by Intervenor Jung – it would actually exact a hardship on the public.

responsible for inspection during construction. Staff's Initial Brief p 8; 4 Tr 273-274.

Intervenor Turner presented no evidence regarding safety and engineering standards and presented no argument opposing the Project based on safety of the pipeline.

Intervenor Jung takes the position that if the pipeline is safe, then it does not require replacement and if it is unsafe, all operations should cease and the existing pipeline should be wholly removed and replaced with new pipeline. Although Intervenor Jung presented no evidence relative to the safety of the pipeline and also presented no evidence challenging the safety of the existing pipeline or the safety of the design and route of the pipeline as proposed in Enbridge's Application, Intervenor Jung characterizes the pipeline as "unsafe" and argues that "Enbridge should properly cease operation of the unsafe pipeline, remove the unsafe pipeline and replace it with a safe pipeline for the transmission of crude oil." *Id.*

This ALJ finds that there was no evidence in the record to suggest that Line 6B is unsafe but, rather, the evidence demonstrates that it is a pipeline in need of numerous repairs which make replacement of the same a more reasonable alternative to the disruptions caused by a large number of repairs. For purposes of this Project, this ALJ finds that the evidence in this matter, which is unrefuted, demonstrates that the preferred method of replacement of the portions of Line 6B at issue, is deactivation of the current line and filling the

deactivated line with nitrogen, rather than full removal of the existing line and replacing the old pipe with new pipe.

D. Miscellaneous

1. Eminent Domain

Both Intervenor Turner and Intervenor Jung spend a large part of their arguments (as set forth in their briefs) on the issue of eminent domain. As set forth in their briefs, the intervenors strenuously object to the Project primarily based on the position that Enbridge does not need any additional land, outside that of the current permanent easement. They further argue that the Commission's approval of the Application will result in an unconstitutional taking of the additional land Enbridge asserts that it needs for the project, as set forth in the Application.

At this time, this ALJ finds the arguments of the intervenors to be premature and inapplicable to the proceedings before the Commission. Matters of takings, eminent domain, and condemnation are not within the scope of the proceedings before the Commission but, rather, issues to be addressed by the circuit court at a later time. This ALJ finds that the only determination to be made is whether the evidence presented on the record in support of Enbridge's Act 16 Application demonstrates a public need for the proposed pipeline, and whether the proposed pipeline is designed and routed in a reasonable manner, which meets or exceeds current safety and engineering standards (i.e. a determination

of public convenience and necessity). As correctly noted by Staff in its Reply Brief, it is only,

after receiving a determination of public convenience and necessity from the MPSC, the party desiring to build the pipeline is to proceed in the manner provided in 1980 PA 87, and begin a condemnation action in court. Other than making the determination of public convenience and necessity the MPSC, having only the powers that the legislature vested it with, does not have any powers to condemn property.

Staff's Reply Brief p 6.

The determination of whether or not condemnation is appropriate is, however, within the jurisdiction of the courts and not the Commission. Matters related to condemnation are not within the jurisdiction of the Commission. Thus, this ALJ finds that the intervenors' arguments regarding eminent domain are inapplicable to the proceedings before the Commission.

2. Motion to Strike

As mentioned above, on December 28, 2011, between the time the parties filed briefs and reply briefs, Intervenor Jung filed a Motion to Compel Responsive Answers to Intervenor Jung's First Discovery Requests dated November 23, 2011. A hearing was scheduled on Intervenor Jung's motion for January 17, 2012. On January 12, 2012, Enbridge filed a response to Intervenor Jung's motion. The hearing scheduled for January 17, 2012, was subsequently cancelled based on Intervenor Jung's request that the hearing be cancelled and that this ALJ make a ruling on the motion in writing based on briefs.

This ALJ finds that Intervenor Jung's Motion to Compel is untimely and bases her decision on the following:

- a. Counsel for Intervenor Jung was at the prehearing conference. While he was not formally representing Intervenor Jung in these proceedings, he was aware of the schedule on that day (9/21/2011);
- b. On the day of the hearing on the Petition to Intervene (November 1, 2011), Intervenor Jung represented that he was prepared to “move forward with discovery” and prepared to keep with the scheduling order in this matter;
- c. Despite knowing the schedule from the date of the prehearing and knowing that time was limited, Intervenor Jung waited until November 23, 2011, to send out his First Discovery Requests;
- d. This First Discovery Request was made only 8 days prior to the date of the scheduled cross-examination and evidentiary hearing in this matter;
- e. Despite having received the First Discovery Requests only 8 days prior to cross-examination, Enbridge responded within 2 business days (November 29, 2011) by providing responses to fifteen (15) of the interrogatories and six (6) requests for production of documents. According to Enbridge, it did so in order to make sure the information was “available for the evidentiary hearing so that Intervenor Trust could cross examine Enbridge’s witnesses;
- f. Intervenor Jung waived his right to conduct cross-examination of Enbridge’s witnesses, who were all present at the time of cross-examination on December 1, 2011, by choosing not to appear and cross-examine the witnesses;
- g. Enbridge served the remaining responses on Intervenor Jung on December 7, 2011;
- h. Intervenor Jung waited almost a full month until December 28, 2011, after the close of the evidentiary record, and after initial briefs had been filed to file his Motion to Compel and did not request that the record be re-opened for purposes of addressing discovery.

This ALJ finds that Intervenor Jung did not timely pursue discovery in this matter and waived his right to cross-examination where he would have been permitted to pursue the disclosure information requested in the discovery

requests from the witnesses present and/or raise his objections to the responses received from Enbridge on the record. Because the evidentiary record was closed prior to Intervenor Jung filing his Motion to Compel and because Intervenor Jung waived his right to pursue the information sought at the time of the evidentiary hearing by opting not to attend the same, this ALJ denies Intervenor Jung's motion. Additionally, a review of the discovery sought by Intervenor Jung appears to, in part, seek information that is not relevant to the matter before the Commission but, rather, an effort to discover information in preparation of condemnation proceedings. Thus, this ALJ finds that while the motion of Intervenor Jung is being denied for the reasons set forth above, the discovery requests largely did not appear to be reasonably calculated to lead to the discovery of admissible evidence in the matter before the Commission.

VI.

CONCLUSION

Based upon the foregoing, this ALJ recommends that the Commission issue an order in favor of Enbridge's Application finding that:

1. Evidence supports that there is a public need for the proposed pipeline Project;
2. Evidence supports that the design and route of the proposed pipeline Project is reasonable; and
3. Evidence supports that the design and route of the proposed pipeline Project meets or exceeds safety and engineering standards.

Additionally, this ALJ recommends that the Commission issue an order finding that:

4. Intervenor Jung's Motion to Compel was untimely and properly denied; and
5. The issue of the propriety of condemnation of additional property sought by Enbridge pursuant to its Application is not properly before the Commission.

MICHIGAN ADMINISTRATIVE HEARING
SYSTEM
For the Michigan Public Service Commission

Theresa A. Sheets
Administrative Law Judge

March 13, 2012
Lansing, Michigan
drr